No. 84-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners seek review of a four-to-three majority decision of the Fourth Circuit Court of Appeals reversing dismissal of the case and placing in jeopardy the homes, businesses, farms and churches of over 27,000 people. Respondent urges this Court to deny review, even though the decision has far-reaching consequences and raises issues that have sharply and equally divided the eight federal judges who have considered them (the district court judge and seven judges of the court of appeals).

A. If This Court Denies Review, Thousands Of Innocent Persons Will Suffer Harm.

In an effort to minimize the importance of the decision below, respondent asserts that the current landowners will be unharmed by the majority decision prolonging this litigation, because, respondent predicts, Congress eventually will pass settlement legislation to aid the landowners.[1] By this argument, respondent concedes that the

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[1] Respondent's Brief in Opposition at 9-11 [hereinafter cited as "Brief in Opposition"].

ultimate relief that it seeks has potentially disastrous consequences for thousands of innocent landowners. It is because the relief sought by respondent is so staggering that the Catawbas expect to force a settlement from the federal government. In essence, the Catawbas ask this Court to aid them in extracting a payment from Congress by denying review concerning the threshold legal issue of whether they now are entitled even to assert this claim.

Furthermore, respondent's unsupported assumption that Congress will rescue the landowners by agreeing to pay millions of dollars[2] for settlement legislation ignores political reality. The Rhode Island and Maine settlement acts cited by respondent[3] were enacted during the previous administration. The current administration has been far less inclined to provide even modest federal payments to settle Indian claims against non-federal defendants.[4]

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[2] The land at issue is highly developed and has been estimated to be worth more than a billion dollars. H.R. 3274, 96th Cong., 1st Sess. (1979). In 1979 the Catawbas sought 30 million dollars from Congress to resolve their claim. Hearings on H.R. 3274 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30 (1979).

[3] *See* Brief in Opposition at 10, n.5.

[4] For example, the Connecticut settlement legislation cited by the Catawbas as an example of a federal rescue was originally vetoed by President Reagan, who, in his veto message, declared that it is the administration's policy to pay no more than half of any settlement of Indian land claim litigation against a state and private parties. President's Message to the Senate Returning S.366 Without Approval, Cong. Rec. S4154-55 (1983). The Connecticut settlement legislation was subsequently amended and approved after the State of Connecticut agreed to contribute additional land and special services. The federal contribution amounted to less than one million dollars. Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (1982).

Indeed, the federal government did not contribute a single penny to the settlement fund in the one other Indian land claim settled during this administration. *See* Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741-1749 (1982). The State of Florida funded this settlement with the Miccosukee Tribe.

Consistent with the administration's position that the federal government will not be coerced into funding settlements of disputes between Indians and private citizens or the states, President Reagan has strongly cautioned litigants in Indian claims against relying on the federal government to fund a resolution of their disputes:

> I cannot . . . pledge the Federal Treasury as a panacea for this problem.

President's Message to the House of Representatives Returning H.R. 5118 Without Approval, 18 Weekly Comp. Pres. Doc. 732-33 (June 1, 1982).

[5] The Catawbas' reference to a newspaper article concerning a single construction project in Rock Hill, which presumably was planned and funded years before the Fourth Circuit majority's decision, hardly demonstrates that the defendants will emerge from this litigation without costs or that they are currently unaffected by the litigation. Various businesses in the claim area have had financial difficulties relating to the litigation, and there has been sufficient concern among homeowners in the area that an association was formed to contribute to the costs of defending their homes.

[6] Brief in Opposition at 12-15.

Thus, contrary to respondent's assertion, the landowners cannot assume that the federal government will fund a settlement of the claim, now or ever. Moreover, even if Congress were inclined to pass settlement legislation, it would be more likely to do so after a definitive resolution of the threshold issues presented here than while the viability of the claim is unclear. Most importantly, even if a settlement is ultimately achieved, the innocent landowners in this case could never be compensated for the hardships and uncertainties which result from the mere pendency of the litigation.[5]

B. The Catawba Termination Act Makes State Law, Including The State Statute Of Limitations, Apply Both To Individual Catawbas And To The Tribe.

Respondent argues that the Catawba termination act contains unique statutory language, making state law applicable only to individual Catawbas and not to the tribe.[6] Respondent's argument is based upon faulty analysis of the language and context of the Catawba termination act. The Catawba termination act specifically provides:

> [*T*]*he tribe and its members* shall not be entitled to any of the special services . . . because of their status

> as Indians, [federal Indian statutes] shall be inapplicable to them, and *the laws of the several States shall apply to them* in the same manner they apply to other citizens or persons within their jurisdiction.[7]

The statute can *only* be construed in a grammatically correct way as making state law apply to "*them*"—"*the tribe and its members*,"—which is the subject of the sentence.

A comparative analysis of the language of other termination acts confirms that the Catawba act, like other such acts passed before and after it, makes state law applicable to the Indians both individually and collectively. Eight termination statutes provide in exactly the same words:

> [A]nd the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.[8]

In each of these statutes this language stands as an independent sentence with "tribe and its members" as the subject. In the Catawba termination act, the same provision appears as part of a compound sentence. The *only* difference between these eight statutes and the Catawba act is that the pronoun "them" has replaced the words "the tribe and its members." But the antecedent of the pronoun is "the tribe and its members."[9] Thus, once the pronoun is replaced by its antecedent, the act is identical to these eight termination acts, and all nine acts make state law apply to "the tribe and its members" in the same manner as to "other citizens or persons."

The Ponca termination act, which was passed after the Catawba act, is identical to the Catawba act in this re-

[7] Catawba, 25 U.S.C. § 935 (1982) (emphasis supplied).

[8] Klamath, 25 U.S.C. § 564q (1982); Western Oregon, 25 U.S.C. § 703 (1982); Alabama-Coushatta, 25 U.S.C. § 726 (1982); Paiute, 25 U.S.C. § 757(a) (1982); Wyandotte, 25 U.S.C. § 803 (1982); Peoria, 25 U.S.C. § 823 (1982); Ottawa, 25 U.S.C. § 848 (1982); Menominee, 25 U.S.C. § 899 (1982).

[9] Catawba, 25 U.S.C. § 935 (1982).

spect. It provides that state law shall apply to "them," using "them" to refer to the "tribe and its members."[10] Thus, each of these ten termination statutes, including the Catawba act, clearly makes state law apply to the affected Indians, both as individuals and as a tribe.

Where Congress intended in a termination act to draw a distinction between individual Indians and their tribe, it did so with specificity. In the Mixed-Blood Ute termination statute, where individual Indians were terminated but a federally-protected tribe continued, the provision concerning state law clearly distinguished between an individual terminated Indian and the unterminated tribe by providing that state laws should apply "to *such member* in the same manner as they apply to other citizens within their jurisdiction."[11] The distinction between an individual Indian and an Indian tribe is indicated by reference to "such member" of the tribe.

Surely, if Congress had intended by the Catawba act to create a distinction between individual Indians and the tribe under state law, it would have used distinguishing language in the act. But it did not. Instead Congress used the same language that it used in nine other termination acts which make state law apply to *both* individual Indians and the tribes.

At a minimum, if the significant distinction urged by respondent were intended, it would appear in the legisla-

[10] Ponca, 25 U.S.C. § 980 (1982). The Catawbas erroneously assert that it is the California Rancheria Act that is identical to the Catawba act, rather than the Ponca Act. Brief in Opposition at 15, n.14. But the Rancheria Act uses the pronoun "them" to refer to a different antecedent than in the Catawba and Ponca acts. The Rancheria act provides that state law shall apply to "them," referring to "the Indians who receive any part of such assets, and the dependent members of their immediate families." The Catawba and Ponca termination acts provide that state law shall apply to "them," referring to "the tribe and its members." Catawba Act, 25 U.S.C. § 935 (1982); Ponca Act, 25 U.S.C. § 980 (1982); California Rancheria Act, Pub. L. No. 85-671 (1958). Exhibits E, D and C in the Appendix, Brief in Opposition.

[11] Mixed-Blood Ute, 25 U.S.C. § 677v (1982) (emphasis supplied).

tive history. To the contrary, legislative history demonstrates that the Catawba act was typical termination legislation intended to end entirely any special federal status for the Indians, either as individuals or as a tribe. Congressman Hemphill, the sponsor of the bill, told the House Subcommittee on Indian Affairs that the bill was "the usual termination bill, with the usual provisions with which you are intimately familiar." [12] He and other congressmen, administrative officials, and the Catawbas themselves consistently referred to the proposal as "termination." [13]

The only collective action which Congress contemplated that the Catawbas could undertake after termination was as a non-profit organization subject to state law. Congressman Hemphill, Subcommittee Chairman Haley and the Associate Commissioner for the Bureau of Indian Affairs, all declared that the Indians could form a non-profit corporation under state law if they wished to continue

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[12] Hearings on H.R. 6128 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess. 12 (1959). The Subcommittee held two public hearings on the bill on July 10 and July 27, 1959. It held an Executive session on August 7, 1959. The full Committee met on the bill on August 12, 1959. Each of these transcripts will be referred to by date.

[13] *E.g.*, Transcript, July 10, 1959 at 20 (remarks of Mr. Edmonson indicating that he considered the proposed legislation to be similar to the Wyandotte and Peoria termination acts); Transcript, July 10, 1959 at 46 (remarks of Catawba Samuel Beck in opposition to the legislation precisely because he understood that the tribe would be affected: "I feel if termination is made then our tribe will be non-existent from here on out and we will not have a reservation."); Transcript, July 10, 1959 at 90 (remarks of Subcomm. Chairman Haley calling the envisioned result of the bill "termination"); Transcript, July 27, 1959 at 85-6 (remarks of H. Rex Lee, Associate Commissioner of the BIA, referring to the proposal as "termination"); Transcript, August 12, 1959 at 10, 15 (remarks of Lewis A. Sigler, Legislative Counsel, Office of the Solicitor of DOI, describing the proposal as a "termination process" and comparing the Catawba act to other termination acts without mention of any purported distinction between individual Catawbas and the tribe).

some form of group activities.[14] The Solicitor's Office of the Department of the Interior also explained to the Catawbas prior to their final vote to accept termination:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. *Nothing in the act prohibits those interested in organizing under State law* to carry on any of the nongovernmental activities of the group.[15]

Thus, both the language and the legislative history of the Catawba act demonstrate that the act makes state law applicable to the tribe, as well as to individual Catawbas. Even as a group, they were subjected to all the effects of termination and were, therefore, obligated to bring any claim they had before the expiration of the state statute of limitations.

C. Proper Construction Of The Catawba Act Depends Upon What Congress Intended And Provided.

Respondent argues that the Fourth Circuit majority was somehow justified in ignoring the plain language of the Catawba termination act because the Catawbas passed a tribal resolution requesting that legislation be drafted but that an undefined claim against the State of South

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[14] Transcript, July 10, 1959 at 30, 53-4; Transcript, July 27, 1959 at 90. Indeed, the Catawbas took that advice. The respondent styles itself as a non-profit organization chartered under South Carolina law.

[15] App. Rec. at 531 (Petitioners' Ex. 29 at 5) (emphasis supplied). The respondent contends that the Catawbas can still function as a federal tribe, with special privileges and immunities. But the tribal constitution was revoked, and the Bureau of Indian Affairs does not recognize the Catawbas as a tribe for any purpose under federal law. App. Rec. at 551 (Petitioner's Ex. 39).

Carolina be unaffected by the requested legislation.[16] Respondent further suggests that the Catawbas' "understanding" of the legislation, as reflected in a resolution passed before the legislation was drafted, supersedes the plain language of the statute. In support of this contention, respondent principally relies upon a section of the Catawba termination act which provides for a referendum, allowing the Indians to vote on whether to accept termination.[17] What respondent ignores is that the Catawbas voted in this referendum to accept the legislation as enacted, after receiving a full and complete explanation of the act.[18] As enacted, explained to and accepted by the Catawbas, the act failed to preserve any claim from the effects of termination.[19] As with any other statute, the Catawba termination act must be construed as it was written, intended and enacted by Congress.[20]

[16] Brief in Opposition at 5, 12. The tribal resolution explicitly characterized the claim as a claim against the State of South Carolina but failed to give any further description of the nature of the claim. Even if the resolution could somehow determine the meaning of the statute, no claim against private landowners was sought to be preserved. If any claim was saved from the effects of termination it could only have been a claim against the state.

The respondent is inaccurate when it asserts (Brief in Opposition at 24, n.23) that it did not initially argue that only a claim against the state was discussed at the time of the Catawba termination act. At pages 50-51 of the Catawbas' initial brief in the district court opposing dismissal, they asserted that Congress was aware only of a claim against the state at the time of the Catawba termination act. Plaintiff's Response to Defendants' Motion to Dismiss at 50-51.

[17] Brief in Opposition at 16-17.

[18] App. Rec. at 531 (Petitioners' Ex. 29 at 5). *See supra* note 15 and accompanying text.

[19] In several other termination acts, Congress specified that certain claims against the United States would be unaffected by termination. Mixed-Blood Ute, 25 U.S.C. § 677r (1982); Western Oregon, 25 U.S.C. § 706 (1982); Ponca, 25 U.S.C. § 976 (1982).

[20] *E.g., see* Rice v. Rehner, —— U.S. ——, 103 S.Ct. 3291, 3302 (1983); BankAmerica Corp. v. United States, —— U.S. ——, 103 S.Ct. 2266, 2270 (1983); United States v. Hoodie, 588 F.2d 292. 295 (9th Cir. 1978).

The California Rancheria Act also provided that the Indians on various rancherias could vote whether to accept termination; but the circumstances and conditions of their termination were governed by what Congress provided in the statute. When the Rancheria act was later construed in *Table Bluff Band* v. *Andrus*, 532 F. Supp. 255, 264 (N.D. Cal. 1981), the district court declared, "A termination act does not create a contract between the government and the Indians . . . ."

D. Application Of The State Statute Of Limitations To This Claim Would Not Be Unfair.

Respondent argues that it would be unfairly deprived of its "day in court" [21] if the Court reviewed the majority decision and decided that the claim could no longer be asserted in 1980, 140 years after it accrued. Respondent asserts, without explanation, that it has "never before had the opportunity to present its claim for judicial resolution." [22]

To the contrary, the Catawbas admit that they had extensive opportunity to bring whatever claim they had. As long ago as 1905 they were represented by counsel who was aware of a potential claim under the Nonintercourse Act,[23] and they tried to prompt the federal government to act on a claim relating to the 1840 treaty several times over the last 80 years.[24] Moreover, respondent's counsel contended in the recently argued *Oneida* case, that the right to pursue a Nonintercourse Act claim in federal court has existed since 1790, when the first Nonintercourse Act was enacted.[25] Yet the Catawbas failed to bring this claim for 125 years before the Catawba termination act became effective and then for another 18 years

[21] Brief in Opposition at 7-8.

[22] *Id.* at 8.

[23] Brief in Opposition at 1, n.1.

[24] Brief in Opposition at 1, 10, n.8.

[25] Brief in Opposition to Petition for Certiorari at 10, County of Oneida, N.Y. v. Oneida Indians (*"Oneida"*), 719 F.2d 525 (2d Cir. 1983), *cert. granted*, —— U.S. ——, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984).

after the act changed their legal status under federal law.[26]

CONCLUSION

For all of the reasons stated above and in the petition for certiorari, this Court should grant the petition and review the divided decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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[26] The application of state law to the Catawbas did not eliminate their opportunity to bring their claim. Even after the Catawba termination act became effective, the Catawbas had ten years to assert the claim and test its viability before it was barred by the applicable state statute of limitations. But the Catawbas failed to do so.